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In the

Supreme Court of the United States

October Term, 1990

CHARLES WHITE, *et al.*,

Petitioners,

v.

RAYMOND S. DANIEL, *et al.*,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

I. Argument: The Decision of the Court of Appeals is Not Limited as Respondents Contend 2

II. Conclusion 5

TABLE OF AUTHORITIES

Cases

Maryland Citizens for a Representative General Assembly v. Governor of Maryland, 429 F.2d 606 (4th Cir. 1970) 3

Simkins v. Gressette, 495 F. Supp. 1075 (D.S.C. 1980), *aff'd*, 631 F.2d 287 (4th Cir. 1980) 3

Statutes

Voting Rights Act of 1965, § 2, *as amended*, 42 U.S.C. § 1973 . . . . . *passim*

Voting Rights Act of 1965, § 5, 42 U.S.C. § 1973c 5

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This reply brief addresses arguments first raised in the brief in opposition to the petition for writ of *certiorari*. Sup. Ct. R. 15.6.

I. Argument: The Decision of the Court of Appeals is Not Limited as Respondents Contend

The respondents (Brunswick County) contend that "the court of appeals merely ruled that a challenge to the plan filed after *all* of the elections to be conducted under it had already been held was barred by the doctrine of laches." Respondents' Brief in Opposition at 2. In the same vein, the respondents claim that the opinion "certainly does not preclude voting rights suits where there are additional elections scheduled to be conducted under the challenged plan," and that "the court states that . . . plaintiffs may assert a new justiciable cause of action if they believe the Board's [1991] reapportionment decision violates the Voting Rights Act." *Id.* at 7.

The petitioners note first that the narrow interpretation which Brunswick County seeks to place upon the decision of the court of appeals concedes that if the petitioners' interpretation of the reach of the decision is correct, the decision is fatally flawed. Second, it is the County which misstates the facts; the decision below is not limited in the manner it describes.

The court of appeals did not dismiss the complaint merely because it was filed after all the 1980 elections had been held. Rather, the petitioners' lack of diligence was said to lie in the fact that they did not take action, in the court's words, "*well* before the last election to be held

under the 1981 plan." App. 13 (emphasis added). The petitioners' delay was calculated by the court of appeals not simply from the date of the last election under the challenged plan, as the County's argument erroneously presupposes, but from the date the plan was first enacted in 1971. In finding that the petitioners' delay was "inexcusable and unreasonable," the court of appeals specifically noted that "the plaintiffs waited until September 1988 to file this action, seventeen years after the 1971 plan was adopted." App. 11-12.

Any contention that the opinion of the court below is limited to situations where a complaint is filed after all the elections under a challenged plan have been held is totally undermined by the fact that the two cases upon which the court of appeals principally relied, *Maryland Citizens for a Representative General Assembly v. Governor of Maryland*, 429 F.2d 606 (4th Cir. 1970), and *Simkins v. Gressette*, 495 F. Supp. 1075 (D.S.C. 1980), *aff'd*, 631 F.2d 287 (4th Cir. 1980), were cases in which the complaints were filed *before* the last elections under the challenged plans were held. App. 14 n.6. Indeed, the court below noted that in both cases "we emphasized that the untimely challenges were made *just before* a scheduled election [under the challenged plans]." App. 14 (emphasis added). There is simply no warrant for the narrowing gloss which the County seeks to place upon the decision below in order to defeat review in this Court. The decision is

broad in scope and would have a devastating impact upon minority voters.

The County is also incorrect in claiming that the court of appeals expressly held that the petitioners could challenge "the Board's reapportionment decision" in 1991. Respondents' Brief in Opposition at 7. What the court of appeals actually said was that the petitioners could challenge the Board's "1991 reapportionment should [it] violate the Voting Rights Act." App. 17. If there is no reapportionment in 1991, however, just as there was none in 1981, there will be no change in the County's 1971 plan, and, given the reasoning of the court of appeals, the doctrine of laches would remain a bar to a Voting Rights Act challenge.[1] It is certainly not clear how the passage of even more time would effectively remove laches as a bar.

The County's analysis fails to take into account at all the very significant fact that even though additional elections might not be held under the 1971 plan if there is reapportionment, the action of the court of appeals in vacating the decision of the district court deprives the petitioners of a non-discriminatory benchmark, *i.e.*, the court-ordered plan, for measuring retrogression of any

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[1] Even if reapportionment is required after the 1990 Census, given the time needed for adopting a plan, candidate qualifying, *etc.*, and the short time provided for these steps by state law, it is entirely possible that a new plan could not be implemented until after the November 1991 election, and nothing in the state statutes cited by the County requires otherwise.

new plan submitted for preclearance under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, after the 1990 Census.[2] The decision of the court of appeals denies the petitioners' important, protected rights even if no additional elections are held under the existing plan.

II. Conclusion

The petition for writ of *certiorari* should be granted.

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[2] The petitioners take issue with the County's representations that the district court did not "hear any testimony" about alternative plans, and that the court did not "permit[. . .]" the county to submit its own plan. Respondents' Brief in Opposition at 10 & n.1. To the contrary, the district court heard testimony from the petitioners' expert concerning plans he had prepared, while the County was free at any time to submit any plan it wished. Indeed, after the judgment the County filed a motion to modify, and certainly could have requested leave to propose a plan of its own at that time.

Respectfully submitted,

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